INDEX

	Page.
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:	
Husty v. *United States*, 282 U. S. 694	7
King v. *United States*, 1 F. 2d 931	6
McInes v. *United States*, 62 F. 2d 180, certiorari denied, 288 U. S. 616	6
Pinkerton v. *United States*, No. 719, O. T. 1945, decided June 10, 1946	10
Scher v. *United States*, 305 U. S. 251	7, 8
United States v. *Blich*, 45 F. 2d 627	6
United States v. *Keown*, 19 F. Supp. 639	6
United States v. *Li Fat Tong*, 152 F. 2d 650	6, 8
Statute Involved:	
The Marihuana Tax Act of August 2, 1937, c. 553, 50 Stat. 554, as reenacted in the Internal Revenue Code, 53 Stat. 279 ff., 26 U. S. C. 2590 ff	2

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 991

EDWARD S. CANNON AND CHARLES SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 250–253) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 27, 1946 (R. 254). A petition for rehearing was denied January 22, 1947 (R. 260). The petition for a writ of certiorari was filed February 6, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether there was probable cause for the search of an automobile driven by petitioner Cannon.

2. Whether the trial court properly ruled that a government inspector, testifying on a motion to suppress evidence as to probable cause for a search, could not be cross-examined as to the identity of his confidential informant.

3. Whether petitioners could properly be convicted of conspiracy unlawfully to import and acquire marihuana and of the substantive offense of acquiring marihuana without the required official order form.

STATUTE INVOLVED

The Marihuana Tax Act of August 2, 1937, c. 553, 50 Stat. 554, as reenacted in the Internal Revenue Code, 53 Stat. 279 ff., 26 U. S. C. 2590 ff., provides in pertinent part as follows:

> SEC. 2593 (a). It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand

by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

STATEMENT

Petitioners were convicted on the first and fourth counts of a four-count indictment against them and two others in the United States District Court for the Southern District of Texas (R. 5–13, 241–242). The first count charged conspiracy to violate the customs laws by unlawfully importing marihuana into the United States and to violate the Marihuana Tax Act by importing marihuana and unlawfully receiving the transfer of marihuana without an official order form required by law (R. 5–11). The fourth count charged a substantive violation of the Marihuana Tax Act in that petitioners unlawfully acquired marihuana without having paid the tax required by law and possessed marihuana which had been transferred without the written order form provided for that purpose by the Secretary of the Treasury (R. 12–13). Petitioner Cannon was sentenced to imprisonment for two years on the first count and eighteen months on the fourth, the sentences to run consecutively (R. 243–244). Petitioner Smith was sentenced to imprisonment for two years on each of counts 1 and 4, the sentences

to run consecutively (R. 244–245). On appeal the judgments were affirmed (R. 254).

The principal question raised by petitioners relates to the admissibility of a sack of marihuana seized by customs agents after a search of an automobile driven by petitioner Cannon. Cannon moved before trial to suppress such evidence (R. 14–17), and after a hearing, his motion was denied (R. 18–33). The customs inspectors who made the search also testified at the trial to the circumstances leading up to the search (R. 34–54, 73–89), and defense counsel objected to the admissibility of evidence relating to the finding of the marihuana, but such objections were overruled (R. 50–51, 85–86, 213).

The evidence adduced on this issue may be summarized as follows:

United States customs inspectors were told by an informer, who had previously proved to be reliable, that petitioners were to be in Nuevo Laredo, Mexico, on January 16, 1946, for the purpose of obtaining marihuana, and that they would have a large gunnysack containing the marihuana (R. 25–26, 28). On the morning of January 16, the agents followed petitioners and the two other persons named as defendants and saw them turn into a tourist court at the north limits of Laredo, Texas (R. 35–37). Shortly after 2:30 p. m., the four defendants left the tourist court in a black Mercury sedan driven

by petitioner Smith (R. 37). The agents lost sight of the car when a passing railroad train blocked their view (R. 37–38).

At about 7 o'clock that evening, the agents noticed the black Mercury sedan about a block from the International Bridge (R. 38, 78). They went to the port of entry and observed the four defendants walking across the International Bridge from Nuevo Laredo (R. 25, 40, 78–79). They saw the four defendants get into the Mercury and followed them as they drove off (R. 41–42, 79–80). Petitioner Cannon left the car and the others drove on to a parking lot (R. 41–42, 79–80). Later the agent saw Cannon talking to the other defendants at the parking lot (R. 81). When the Mercury driven by Smith left the lot, it was followed by petitioner Cannon driving an old Studebaker (R. 43, 81). The Mercury was driven to the tourist court where the defendants had been seen that morning, and the Studebaker was parked for a short time about 200 yards away (R. 44, 82). Subsequently, Cannon drove off and later drove the Studebaker into the tourist court (R. 45, 46, 83).

At about 10 o'clock in the evening, the Mercury driven by Smith headed north (R. 47–48, 83). It was stopped and searched but no contraband was found (R. 48, 85). The inspectors then turned back toward Laredo and saw the Studebaker driven by Cannon headed north (R. 50, 85).

They stopped the car, searched it, and found in the rear trunk a large gunnysack of marihuana (R. 21, 32, 50–51, 86–87). They then arrested Cannon (R. 21, 32, 87).

At the hearing on the motion to suppress, the trial judge sustained the Government's objection to defense counsel's question concerning the identity of the confidential informant (R. 26).

ARGUMENT

1. Petitioners contend (Pet. 5–6, 9–10, 16–20) that the marihuana found in Cannon's automobile was inadmissible in evidence on the ground that the Government had failed to establish probable cause for the search of the automobile. They rely on two district court cases which hold that information obtained from an undisclosed informer is not in and of itself sufficient to establish probable cause. *United States* v. *Blich,* 45 F. 2d 627 (D. Wyo.); *United States* v. *Keown,* 19 F. Supp. 639 (D. Ky.). As the court below pointed out, however (R. 253), the decisions in the circuit courts of appeals are to the contrary. *United States* v. *Li Fat Tong,* 152 F. 2d 650 (C. C. A. 2); *King* v. *United States,* 1 F. 2d 931 (C. C. A. 9); *McInes* v. *United States,* 62 F. 2d 180 (C. C. A. 9), certiorari denied, 288 U. S. 616.

Furthermore, even if the district court decisions relied upon by petitioners were correct, they would not be controlling here. For in this case the search was based, not solely upon the infor-

mation received from the informer, but on that information as corroborated by observations of petitioners' actions. While the acts of petitioners as observed by the agents might not alone have been sufficiently suspicious to constitute probable cause for a search, such acts did tend to confirm the information received from the informer and, considered together with such information, were such as to lead a reasonable man to believe that petitioners were transporting marihuana. The situation is very similar to that before this Court in *Scher* v. *United States,* 305 U. S. 251, where a search initiated as a result of confidential information was sustained. The facts stated by this Court (p. 253) indicate that the actions observed by the officers might not in themselves have been suspicious without the light thrown on such actions by the confidential information theretofore received. See also *Husty* v. *United States,* 282 U. S. 694, where the flight of two men after a car was stopped, together with information received from a confidential informer, was held sufficient to justify the search of an automobile. This Court there said (pp. 700–701):

> * * * To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. *Dumbra* v. *United States,* 268 U. S. 435, 441; *Carroll* v. *United States, supra.* It is enough if the apparent facts which have come to his

> attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. * * *

2. Petitioners' contention that the trial court erred in refusing to permit Cannon to cross-examine the agent in respect of the identity of his confidential informer (Pet. 5, 6, 7–9, 20–24), is without merit. It is established that such information need not be disclosed unless essential to the defense. *Scher* v. *United States,* 305 U. S. 251, 254, and cases cited; see also *United States* v. *Li Fat Tong,* 152 F. 2d 650 (C. C. A. 2). And since, as we have shown, the search here was based not on the informer's disclosures alone, but on such information as corroborated by observation of petitioners' actions, the identity of the informer was not a vital matter in establishing good faith on the part of the officers.

3. Petitioners' final contention that the Government should have been compelled to elect whether to proceed on the first or the fourth count of the indictment (Pet. 5, 7, 10–11, 24–25) is untenable. They argue that there was a fatal inconsistency between the charge in the first count of a conspiracy to acquire marihuana in Mexico and import it into the United States, and the charge in the fourth count of unlawful acquisition of marihuana in the United States. However, the first count charged a conspiracy, not only to im-

port marihuana, but to acquire it unlawfully after importation. In fact the indictment specifically set forth (R. 7–8) that—

> * * * divers other persons to the Grand Jurors unknown, pursuant to the foregoing arrangement and agreement with the defendants herein, were to unlawfully smuggle and clandestinely import and bring in and introduce said marihuana into the United States of America, and in particular the Laredo Division of the District of Texas, from the Republic of Mexico, without declaration and entry of said marihuana as provided by the Customs Laws of the United States, and said defendants were then to receive transfer of, conceal and assist in receiving and concealing said marihuana in the United States of America, and in particular the Laredo Division of the Southern District of Texas, and said defendants were to receive and transport and facilitate the transportation of said marihuana to the City of New Orleans, State of Louisiana, and defendants were thereafter to sell, transfer and assist in selling and transferring said marihuana to divers persons to the Grand Jurors unknown, * * *

There was thus no inconsistency between the conspiracy charged in the first count and the substantive offense charged in the fourth. Petitioners could, of course, properly be convicted of both conspiracy and a substantive offense.

Pinkerton v. *United States*, No. 719, O. T. 1945, decided June 10, 1946.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or questions of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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